

PD-0242-19

**IN THE COURT OF CRIMINAL APPEALS
FOR
THE STATE OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
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**WILLIAM ROGERS,
APPELLANT,**

VS.

**THE STATE OF TEXAS,
APPELLEE.**

On Appeal in Appellate Cause No. 13-15-00600-CR;
Originally in Trial Court Cause No. 2013-4-5466 in the
24th Judicial District Court of Refugio County, Texas;
Hon. Juergen "Skipper" Koetter, Judge Presiding.

BRIEF OF APPELLANT, WILLIAM ROGERS

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July 26, 2019
NO ORAL ARGUMENT

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the parties to the suit are as follow:

APPELLANT	WILLIAM ROGERS
APPELLEE	THE STATE OF TEXAS
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BRIEF OF APPELLANT, WILLIAM ROGERS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, **WILLIAM ROGERS**, Appellant in this matter, and respectfully submits this BRIEF OF APPELLANT after the granting of his Petition for Discretionary Review. This appeal comes to this court a second time following the opinion and judgment of the 13th Judicial District Court of Appeals’ affirming the judgment and sentence imposed in the trial court convicting Appellant of the

offense of “Burglary of a Habitation” a Second Degree Felony, with a first degree punishment range.

This appeal originally arises from the 24th Judicial District Court of Refugio County, Texas, the Honorable Juergen “Skipper” Koetter, Judge Presiding, in District Court Cause Number 2013-4-5466, in which the Appellant, **WILLIAM ROGERS**, was the Defendant and the **STATE OF TEXAS** was the Plaintiff. For purposes of this brief, **WILLIAM ROGERS** shall be referred to as “Appellant” and the **STATE OF TEXAS**, as the “State.”

I.

STATEMENT OF THE CASE

Appellant was charged in two indictments after an incident that occurred at the alleged victim’s home. In Tr. Ct. Cause No. 2013-4-5466, Appellant was charged with “Burglary of a Habitation.” Appellant elected to go to trial before a jury. After evidence and argument was presented by both parties to the jury, Appellant was found guilty and convicted of “Burglary of a Habitation.” The convicting jury sentenced Appellant to forty (40) years in the Texas Department of Criminal Justice-Institutional Division, a fine and court costs.

II.

STATEMENT OF PROCEDURAL HISTORY

Appellant was formally charged with Burglary of a Habitation by written indictment filed with the Refugio County District Clerk on, or about, April 9, 2013. [CR-8].

On, or about, November 30, 2015, the Assistant Refugio County District Attorney read the indictment aloud to the jury, but only Paragraph B of Count I, to which Appellant entered a plea of “Not Guilty.” [RR-IX-6-7].

Appellant’s trial continued until December 3, 2015, when the jury delivered a verdict of “Guilty” as to Count I, Paragraph B. [RR-XII-95-96].

On, or about, December 3, 2015, the punishment phase of the trial began. [RR-XIII-1]. Both sides presented evidence to the jury, rested and closed. [RR-XIII-37]. The jury assessed forty (40) years imprisonment in the Texas Department of Criminal Justice. [RR-XIII-38; CR-294].

The Trial Court indicated in its “Trial Court’s Certification of Defendant’s Right of Appeal” that this matter was not a plea bargain case, and that Appellant had the right to appeal. [CR-326].

Appellant’s Notice of Appeal was timely filed. [CR-298].

Following briefing in this case, the Honorable 13th Court of Appeals denied

oral argument and considered Petitioner's appeal by submission. The Honorable 13th Court of Appeals issued an opinion on, or about, March 9, 2017, affirming Appellant's conviction in Tr. Ct. Cause No. 2013-4-5466; App. Cause No. 13-15-00600-CR and vacating and dismissing the conviction in Tr. Ct. Cause No. 2013-4-5468; Cause No. 13-15-00601-CR.

A motion for rehearing was timely filed on, or about, March 24, 2017. Petitioner's motion for rehearing was denied on, or about, April 19, 2017.

Appellant filed a Petition for Discretionary Review in this matter on, or about, May 19, 2017.

On or about August 23, 2017, this Honorable Court of Criminal Appeals granted Appellant's petition for discretionary review, as to ground three only, and indicated that it would not permit oral argument.

After briefing by both Appellant and the State, the case before this Honorable Court of Criminal Appeals was decided without oral argument. On or about June 27, 2018, this Honorable Court of Criminal Appeals reversed the 13th Court of Appeals' decision regarding harm and remanded the case for a determination of whether the trial court erred in refusing to instruct the jury on self-defense and necessity.

On January 10, 2019, the Honorable 13th Court of Appeals issued an opinion

concluding that Appellant was not entitled to a jury instruction on self-defense or necessity, and, accordingly, the trial court did not abuse its discretion by failing to include such in the jury charge.

Appellant timely filed his Motion for Rehearing in accordance with and pursuant to T.R.A.P. 49.1. Appellant's Motion for Rehearing was overruled on, or about February 7, 2019.

Appellant timely filed his Petition for Discretionary Review following the overruling of his Motion for Rehearing. This Honorable Court granted Appellant's Petition for Discretionary Review on its sole ground on, or about, June 26, 2019. Oral argument was not permitted.

III.

RECORD BEFORE THE COURT

The Clerk's Record consists of one (1) volume. The Clerk's Record will be cited using the abbreviation "CR" referring to the Clerk's Record followed by the appropriate page number. For example, page three of the Clerk's Record will be cited as [CR-3].

The Reporter's Record furnished to Appellant consists of fourteen (14) volumes, including exhibits. The Reporter's Record will be cited using the

abbreviation “RR,” followed by a numeral to indicate the appropriate page number(s). For example, page four of volume five of the Reporter’s Record will be cited as [RR-V-4].

IV.

STATEMENT OF FACTS

During the State’s case in chief, the alleged victim, David Everett Watson testified on behalf of the State. Mr. Watson was 63 years of age at the time of trial and a resident of Woodsboro, Refugio County, Texas. Mr. Watson was married to Sandra Watson who also resided with him. [RR-X-17]. During his testimony, Mr. Watson testified he was surprised to learn about the contacts between Appellant and his wife, Sandra. [RR-X-142].

During the trial, Martin DeLeon, who was employed by Refugio County as an investigator at the time of the incident made the basis of this appeal, also testified. DeLeon confirmed that Appellant had access to the Watson home. [RR-XI-62]. DeLeon further revealed that there were several electronic communications between February 10-14 prior to the incident, including lengthy and detailed discussion on Facebook between Appellant and Sandra Watson. [RR-XI-69].

During his own testimony, Appellant testified that he had Sandra Watson’s

permission to go into the Watson house to feed the cats. [RR-XI-173]. Appellant also described his relationship with Sandra Watson as having been going on for a year and eight months. [RR-XI-174-175].¹

During the trial, Appellant further testified as to the events of the encounter leading to his indictment. Appellant, at the time of trial, was a forty-six year old owner of a crude oil hauling trucking company. [RR-XI-108]. On the date of the incident at the Watson residence, Appellant went to the home, walked in the front door, let himself in and turned off the alarm to the residence. [RR-XI-117]. He went to feed the cats and testified that he had done so previously, in the same manner, as he described for the jury. [RR-XI-119]. Appellant opened the back door and put one foot out the door. [RR-XI-120]. He went back into the house to close the freezer door, when he saw David Watson walking down the front walkway. [RR-XI-122]. Appellant immediately turned around to the back door, which he had just left, and tried to open it. [RR-XI-123]. Appellant could not get it open. [RR-XI-123].

Appellant next went to what he called “Sandra’s sanctuary.” [RR-XI-123]. Appellant testified that he went over to a window that Sandra Watson had showed

¹ During an offer of proof before the Court, Appellant testified that he had been in a relationship with Sandra Watson, including sexual relations, between June 2011 and February 2013. [RR-XII-5-7].

him in the past that was her escape route out of the house where some hurricane shutters had been removed from the bottom. [RR-XI-125]. Appellant was not able to get out so he went from the window to a closet. [RR-XI-125]. He entered the closet and about that time the alleged victim entered the front of the house. [RR-XI-126].

Appellant testified that he was in the closet and was very cramped because of the clothing and shoes.

After listening for an opportunity to flee, Appellant testified that he saw that the light coming in the closet dims and he realized that something was blocking a path for the light to come into the closet. [RR-XI-130]. Appellant testified that the dimming of the light was the alleged victim, David Watson, jumping in front of the door holding a knife shouting “You” very loudly. Appellant testified that Mr. Watson was in a “linebacker stance,” with his knees bent and he was moving the knife up and down in his right hand. [RR-XI-130-131].

Upon seeing Mr. Watson, Appellant was startled and took about a half a step back. [RR-XI-131]. Mr. Watson started coming in the closet. Appellant reached for a gun that was on top of a safe located in the closet. [RR-XI-132]. Appellant testified that he did not put the gun there, the gun being a PK380 that he did not own. [RR-XI-133].

Bringing up the gun straight, the alleged victim struggled with Appellant, and as Appellant felt his hand grabbed, he pulled the trigger. [RR-XI-134]. Immediately following, Appellant could not step back any further and he reached for the knife that was coming up higher at that point. [RR-XI-134]. The alleged victim immediately stopped, let go, and stepped back. [RR-XI-134]. Mr. Watson stepped outside the closet and exited. [RR-XI-134].

Appellant got to the door jam and he saw the alleged victim in front of him and the alleged victim was bringing up his weapon. [RR-XI-135]. Mr. Watson's other hand was going for the gun. *Id.* Appellant was nicked slightly above the belly with the knife. [RR-XI-136].

Prior to the jury receiving the charge, Appellant requested instructions on necessity and self-defense. The request for defensive instructions was denied by the Trial Court. [CR-269-273].

V.

ISSUE GRANTED FOR REVIEW AND PRESENTED

GROUND FOR REVIEW:

Did the 13th Court of Appeals err in the analysis for error considering the evidence in the record of this case?

VI.

SUMMARY OF THE ARGUMENT

Would a reasonable person think being approached by your lover's husband, who is holding a knife, while the person is in a closet in the husband's home, is an immediately dangerous situation necessitating action or self-defense? Yes. At the very least, this set of facts warrants, upon request, instructions to a jury to consider and resolve the issues of necessity and self-defense.

Testimony at trial, including Appellant's own testimony established the right to request and receive defensive instructions in the jury charge. The Trial Court did not believe that Appellant was entitled to a self-defense nor a necessity instruction, and clearly tried to limit Appellant's defense claims at, and during, his trial. Nonetheless, the failure to give Appellant the requested instruction was reversible error as to the Burglary charge in this case. As such, Appellant is entitled to a new trial during which his defenses can be evaluated and a jury can be properly instructed in how to consider his justification defenses.

VII.

BRIEF OF THE ARGUMENT

GROUND FOR REVIEW RESTATED:

Did the 13th Court of Appeals err in the analysis for error considering the evidence in the record of this case?

I. STANDARD OF REVIEW AND APPLICABLE LAW

A. *General standards with respect to requested defensive issue instructions.*

A trial court is required to submit a jury charge that sets out the law applicable to the case. TEX. CODE CRIM. PROC. art. 36.14. A trial court is required to instruct the jury on statutory defenses, affirmative defenses, and justifications when they are raised by the evidence and requested by the defendant. *Walters v. State*, 247 S.W.3d 204, 208-09 (Tex. Crim. App. 2007).

A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001); *accord Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). "Raised by the evidence" means "there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that th[e]

element is true." *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007). The purpose of this rule is to ensure that the jury, not the trial court, decides the relative credibility of the evidence. *Id.* at 655.

Defensive issues may be raised by the testimony of any witness. *VanBrackle v. State*, 179 S.W.3d 708, 712-13 (Tex. App.—Austin 2005, no pet.). Further, the defendant's testimony alone may be sufficient to raise the defensive theory requiring that the court submit a charge on that defense. *Hayes v. State*, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987); *Warren v. State*, 565 S.W.2d 931, 934 (Tex. Crim. App. 1978). In determining whether the testimony of a defendant raises an issue of self-defense, the truth or credibility of the defendant's testimony is not at issue. *Rodriquez v. State*, 544 S.W.2d 382, 383 (Tex. Crim. App. 1976); *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.-Houston [1st Dist.] 1994, pet. ref'd). In determining whether testimony raises a defensive theory, the evidence is viewed in the light most favorable to the defendant. *VanBrackle v. State*, 179 S.W.3d 708, 712-13 (Tex. App.—Austin 2005, no pet.).

A trial court's decision to deny a defensive issue in a jury charge is reviewed for an abuse of discretion. *See Westbrook v. State*, 29 S.W.3d 103, 122 (Tex. Crim. App. 2000).

B. *Elements of self defense.*

In general, justification defenses like necessity and self-defense apply to “the conduct in question.” TEX. PENAL CODE § 9.02. A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. *See* TEX. PENAL CODE § 9.31(a). A reasonable belief means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor. TEX. PENAL CODE § 1.07(a)(42). To justify the use of deadly force against another, an actor must first show he reasonably believed the force was immediately necessary to protect the actor against the other's use or attempted use of unlawful force. TEX. PENAL CODE §§ 9.31(a), 9.32(a).

C. *Elements of necessity.*

The defense of necessity is defined in § 9.22 of the Texas Penal Code. A party's "conduct is justified if ... the actor reasonably believes the conduct is immediately necessary to avoid imminent harm." TEX. PENAL CODE § 9.22(1).

II. THE 13TH COURT OF APPEALS ERRED IN THE ANALYSIS FOR ERROR CONSIDERING THE EVIDENCE IN THE RECORD OF THIS CASE.

The heart of the appeal before this court at this time is encapsulated in the following question: Would a reasonable person think being approached by your lover's husband, who is holding a knife, while the person is in a closet in the husband's home, was an immediately dangerous situation necessitating action or requiring self-defense?

A. The record establishes that Appellant's conduct merited inclusion of necessity and self-defense instructions.

The first opinion of the 13th Court of Appeals in this case acknowledged that "Appellant admitted to committing aggravated assault in his testimony...." "By this testimony, appellant essentially admitted to the offense of aggravated assault." *Rogers v. State*, 527 S.W.3d 329, 333 (Tex. App.—Corpus Christi 2017, pet. granted). Even in finding against Appellant, the Honorable 13th Court of Appeals further conceded that, "The weight of the evidence for appellant's guilt, even if not overwhelming, suggests that the jury would not have accepted claims of self-defense or necessity." *Rogers v. State*, 527 S.W.3d 329, 334 (Tex. App.—Corpus Christi 2017, pet. granted). Thus, the conduct was admitted by Appellant, and the justification defenses would apply if Appellant reasonably believed it was

necessary to protect himself from attempted or unlawful use of force or immediately necessary to avoid imminent harm.

After remand, the 13th Court's opinion of January 10, 2019, focused the analysis on the reasonableness of Appellant's belief that his use of force was immediately necessary or to protect himself from David Watson's use of attempted use of unlawful force. Appellant's conduct was both justified and immediately necessary. This record provides ample evidence to support the inclusion of the requested instructions. As such, Appellant was entitled to both a defensive instruction on self-defense and necessity, and it was an abuse of discretion to deny them.

A person is justified in using deadly force against another when and to the extent that he reasonably believes that deadly force is immediately necessary to protect himself from the other's use or attempted use of unlawful deadly force. *Gonzales v. State*, 474 S.W.3d 345, 349 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *see also* Tex. Penal Code §§ 9.31, 9.32; *Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017). Under a claim of self-defense, a person must reasonably believe that the use of force is “immediately necessary” to protect himself against the other's use or attempted use of unlawful force. *Henley v. State*, 493 S.W.3d 77, 89 (Tex. Crim. App. 2016).

Viewed through the lens of Appellant's testimony, without regard to whether it was strong or weak, unimpeached or contradicted, and regardless of what the trial court may have thought about the credibility of the defenses, there was ample evidence to support the inclusion of the necessity and self-defense instructions. Appellant's own testimony about his acts, as well as David Watson's acts, raised the requested defenses by establishing Appellant's belief that he needed to defend himself, and that such defense was necessary. Moreover, Appellant's testimony clearly provided a basis for a jury to consider and ultimately decide whether Appellant reasonably perceived an immediate need for him to act in self-defense or necessity in this case, justifying his conduct.

The simplest facts in the record in this case establish the entitlement to, and requirement of, the instructions requested. Appellant had a relationship with the alleged victim's wife. Appellant was in the alleged victim's home. Appellant was in a closet in the alleged victim's home when discovered by the alleged victim. Appellant clearly testified that he heard the alleged victim shout "You!" The alleged victim approached Appellant in the confined space of a closet, while the alleged victim had a knife. Appellant testified that when the alleged victim grabbed the gun Appellant was holding, Appellant pulled the trigger. Was that an

apparent dangerous situation that a reasonable person could perceive it was necessary to take immediate action to defend oneself? Yes, it is.

In addition to the testimony itself, the rational inferences from Appellant's testimony further establish the requirement of the requested instructions. The alleged victim yelled at Appellant and shouted, "You!" Obviously the alleged victim recognized Appellant as opposed to a complete stranger in his home. As Appellant testified, he had been having a relationship with the alleged victim's wife. Whether or not David Watson knew that fact, it is sure that Appellant did. A jury could conclude that Appellant reasonably perceived a threat from the husband of the woman he was having a relationship with and was justified in believing such. It would also seem reasonable to perceive the alleged victim's conduct as a threat given that Appellant testified the alleged victim was holding a knife. The aforementioned would be compounded by the fact that Appellant was in the alleged victim's home. The defenses of necessity and self-defense are also reasonable given that the knife wielding alleged victim was close enough to grab the gun in Appellant's hand. It is also a fair, if not an indisputable inference, that if the alleged victim was close enough to grab the gun, he was also close enough to cause serious bodily injury or mortal injury to Appellant with the knife. The presence of the knife's use as described by Appellant clearly establishes that

Appellant perceived and believed that the knife in the alleged victim's hand was being used, or intended on being used, as a deadly weapon by the alleged victim. Based upon all the circumstances, it was reasonable for Appellant to believe that the alleged victim was using the knife or attempting to use the knife to cause Appellant serious bodily injury and he had to take steps to save himself from unlawful use of deadly force, or act to avoid imminent harm.

At the end of the day, Appellant's testimony, and the reasonable inferences therefrom, would have allowed a jury to at least consider and determine whether Appellant's conduct was reasonable when he reached for a gun while in the closet, and any other actions he took, in order to defend himself from the threat that he perceived.

B. *Reasonable belief may be based upon apparent as well as real danger to justify conduct.*

The Honorable Court of Appeals also focused its scrutiny on whether the evidence established a "real threat" of danger. This however, does not take into account that reasonable belief may be based upon an *apparent* danger as well as a *real* danger. As noted in *Hamel*, this Court recognized that "A person has the right to defend himself from apparent danger to the same extent he would if the danger were real." *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). Thus, a

defendant is entitled to a self-defense instruction if the defendant "reasonably perceives that he is in danger, even though that perception may be incorrect." *Id.* A reasonable belief is one that would be held by an ordinary and prudent person in the same circumstances as the defendant. *See* Tex. Penal Code § 1.07(42).

One of the cases relied upon by the 13th Court of Appeals, is the *Preston* decision. *See Preston v. State*, 756 S.W.2d 22 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). In *Preston*, the complainant was in the appellant's house playing music too loudly according to the appellant. After asking the complainant to turn down the music, appellant eventually left the room and returned with a firearm and ordered the complaint to leave his house. The complainant was unarmed and there apparently were no words spoken by him. The appellant fired, shot and killed the complainant. The facts of this case differ from those in *Preston* in an important respect. The facts differ between the immediate case and *Preston*, most notably in that the alleged victim was unarmed and the alleged victim in Appellant's case was holding a knife. Although the facts may be distinguishable from the case *sub judice*, the *Preston* court did comment as follows:

If the accused, by his own testimony or by other evidence, raises the issue of self-defense, he is entitled to an instruction and charge *so long as* such evidence shows the complainant, by words or acts, caused the accused to

reasonably believe he was in danger *and* to reasonably believe deadly force was immediately necessary.

Preston v. State, 756 S.W.2d 22, 24-25 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). The instructive value of *Preston* is that the 14th Court of Appeals pointing out that words, *or acts*, could cause the accused to believe he was in danger and to reasonably believe deadly force was immediately necessary. In this connection, Appellant testified regarding the alleged victim's acts in this case in order to satisfy the elements for self-defense and necessity: the alleged victim wielding a knife and approaching him (an overt act) in the confined space in a closet. In short, the alleged victim's acts establish that the complainant, by words *or acts*, caused Appellant to reasonably believe he was in danger *and* to reasonably believe deadly force was immediately necessary. As such, he was entitled to the jury instructions that he requested and was denied.

Looking at the evidence in this case, through the eyes of Appellant, is what entitled Appellant to the requested instructions. Appellant clearly testified what he viewed, observed and how he acted in response to the events that transpired, The Trial Court precluded the jury from even considering it. Clearly, as Appellant's requested instructions were raised by the evidence, the Trial Court had *no*

discretion but to include them. It was error, and an abuse of discretion to not include the requested justification defenses in the jury charge.

VIII.

CONCLUSION AND PRAYER

WHEREFORE, for the reasons set forth above, Appellant submits that the Trial Court erred in denying his request for defensive instructions, and the 13th Court of Appeals erred in affirming the Trial Court's judgment. Appellant respectfully prays that, following the briefing of the matters raised in this brief, this Honorable Court reverse and remand the judgment and sentence below to the Trial Court for a new trial. In the alternative, Appellant respectfully prays that this Honorable court reverse and remand this case to the 13th Court of Appeals for further proceedings. Appellant further prays for general relief, and any other relief he is entitled to in law or in equity.

Respectfully Submitted,

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IX.

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned, Luis A. Martinez, I hereby certify that the number of words in Appellant's Brief submitted on July 26, 2019, excluding those matters listed in Rule 9.4(i)(3), is 4,128 words.

A handwritten signature in blue ink, appearing to read "Luis A. Martinez", is positioned above a horizontal line.

Luis A. Martinez

X.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served upon the persons below in the manner indicated on this 26th day of July, 2019, pursuant to the Texas Rules of Appellate Procedure.



Luis A. Martinez

Via Email: rclassman@sbcglobal.net

The Hon. Robert C. Lassman
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